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FOURTH REPORT ON STATE RESPONSIBILITY

by

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Addendum

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CHAPTER VII. THE SO-CALLED SELF-CONTAINED REGIMES

97. As indicated in our previous Report, the so-called self-contained regimes are characterized by the fact that the substantive obligations they set forth are accompanied by special rules concerning the consequences of their violation. 226/ The analysis of international practice tells us that the rules performing such functions - mostly if not exclusively treaty rules - are not infrequent in multilateral treaties, particularly in the constitutive instruments of international organizations or isolated organs. As regards the forms of reactions envisaged against violations, they do not differ in substance from the forms of unilateral reaction usually resorted to by States under general international law. Their main feature is that their implementation frequently involves the role of an international body, such role consisting either in monitoring over compliance or in some degree of intervention in the deliberation, direct application or authorization of measures. 227/ Be it as it may of such variations, the main question is whether the rules constituting the so-called self-contained regime affect, and if so in what way, the rights of the participating States to resort to the countermeasures provided for under general international law. 228/ Considering the difficulty of dealing with the issue in abstracto, we had better take a look at some of the allegedly self-contained regimes.

98. The most important instance of an allegedly "self-contained" regime appears to be the system represented by the so-called "legal order" of the EEC. 229/ With regard to this system, the notion that the member States would

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226/ Third Report, cit., paras. 84 ff.

227/ The various possibilities are illustrated by F. Lattanzi, Sanzioni internazionali, Enciclopedia del Diritto, vol. XLI, pp. 559 ff. and by the literature referred to therein.

228/ As noted in the third Report, the problem might also arise with regard to the substantive consequences of a violation of the rules of the so-called "self-contained" regime (Third Report, cit., paras. 86-88).

229/ References to the EEC system as a "self-contained regime" are made, inter alios, by W. Riphagen, Third Report on State Responsibility, YBILC, 1982, vol. II (Part One), p. 33; W. Riphagen, Fourth Report on State Responsibility, YBILC, 1983, vol. II (Part One), para. 120; P. Reuter, J. Combacau, Institutions et relations internationales, Paris, 1980, p. 386; M. Sorensen, Einige Rechtsordnungen - Skizze zu einige systemanalytischen Betrachtungen über ein Problem der internationalen Organisation, in Europäische Gerichtsbarkeit und nationale Verfassungsgerichtbarkeit, Festschrift für H. Kutschner, 1981, p. 431; and B. Simma, Self-Contained Regimes, in Netherlands Yearbook of International Law (NYBIL), vol. 16, 1985, pp. 125 ff.).

have forfeited their liberty to resort to unilateral measures under the general international law of countermeasures has been repeatedly asserted by the Luxembourg Court, the most interesting pronouncements being 9091/63 against Belgium and Luxembourg and 232/78 against France. 230/ Part of the literature shares the Court's view. 231/ Other writers, however, maintain that the

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230/ In the first case the Court rejected the argument of Belgium and Luxembourg according to which the inactivity of the Commission in regulating certain aspects of dairy products trade would constitute a violation of the obligations established by the Treaty; a violation which would justify, in its turn, the violation by the latter of obligations set forth by the same Treaty. According to the Court, the EEC Treaty "establishes a new legal order which regulates the powers, rights and duties of such persons [the persons to whom the Treaty applies], as well as the necessary procedure for determining and adjudicating upon any possible violation thereof". In consequence "... en dehors des cas expressément prévus, l'économie du traité comporte interdiction pour les Etats membres de se faire justice eux-mêmes" ["... save in the cases expressly provided for, the terms of the treaty prohibit the Member States from taking the law into their own hands"]. (Joint Cases 90/63 and 91/63, ECR, 1964, pp. 1217 ff., p. 1232).

In the second case, which concerns the institution by France, in violation of the Treaty, of a national regime for the production of lamb meat, the Court sums up its opinion as follows: "La République française ne saurait justifier l'existence d'un tel régime par la considération nationale de marché pour le même secteur. Si la République française estimait que ce régime comporte des éléments incompatibles avec le droit communautaire, elle aurait la possibilité d'agir, soit au sein du Conseil, soit par l'intermédiaire de la Commission, soit enfin dans le cadre des recours jurisdictionnels en vue d'obtenir l'élimination de ces incompatibilités. En aucun cas, un Etat membre ne saurait s'autoriser à prendre unilatéralement des mesures correctives ou des mesures de défense, destinées à obvier à une méconnaissance éventuelle, par un autre Etat membre, des règles du traité" (Affaire 232/78, Arrêt, Recueil de la jurisprudence de la Cour, 1979, Nos. 8-11, p. 2739). ["The French Republic cannot justify the existence of such a system with the argument that the United Kingdom, for its part, has maintained a national organization of the market in the same sector. If the French Republic is of the opinion that that system contains features which are incompatible with Community law it has the opportunity to take action, either within the Council, or through the Commission, or finally by recourse to judicial remedies with a view to achieving the elimination of such incompatible features. A Member State cannot under any circumstances unilaterally adopt, on its own authority, corrective measures or measures to protect trade designed to prevent any failure on the part of another Member State to comply with the rules laid down by the Treaty" (Case 232/78, Judgment, Reports of Cases before the Court, 1979 Nos. 8-11, p. 2739)].

231/ Compare, inter alios, J. Schwarze, Das allgemeine Völkerrecht in den innergemeinschaftlichen Rechtsbeziehungen, in Europarecht, vol. 18, 1983, pp. 1-39; H.P. Ipsen, Uber Supranationalität, in Festschrift für Scheuner, 1973, p. 211 ff; P. Pescatore, L'Ordre juridique des Communautés Européennes - Etudes des sources du droit communautaire, Liège, 1975, p. 165 and Aspects judiciaires de l'"acquis communautaire", in Revue trimestrielle de droit européen, vol. 17, 1981, pp. 617-651, at pp. 626-8.

faculté to resort to the remedies afforded by general international law cannot be excluded whenever EEC mechanisms have been used without result. 232/

99. It must be stressed that the case-law available is only that of the EEC Court itself - namely of a judicial body which is an integral part of the allegedly self-contained system. No occasion has arisen, so far, for any pronouncement by an external judicial body. It is significant, furthermore, that a full espousal of the EEC Court's view has come, so far, mainly from scholars specially concerned with European Community law. The opposite view is held on the contrary by scholars whose principal interest lies with public international law. One cannot help wondering whether the hypothesis in question is not conceivable only within the framework of the Community "legal system", or, more precisely, within the framework of the international legal relationships set up, among the participating States, by the European Community treaties. Looked at from outside - namely, from the viewpoint of general international law - these treaties do not differ essentially from any other treaties. They remain subject to all the rules of the Law of Treaties. The element of reciprocity is not set aside; and even the choice of the contracting States to be the members of a "community" cannot - as a matter of international law - be considered to be irreversible (at least as long as those States remain sovereign entities and a legal integration is not achieved).

232/ As explained by Simma, "According to what is probably the leading view in literature, however, measures of reprisal or an exception non adimpleti contractus (article 60 of the Vienna Convention on the Law of Treaties) would not become admissible even at this point [namely, after the Luxembourg Court had found a member State in violation of an obligation arising from a previous judgment of the Court]. Other authors are more cautious and consider, though with marked hesitation, a fall-back on the countermeasures provided in general international law as an ultima ratio after all the legal and political means within the EEC system have been exhausted to no avail" (B. Simma, Self-Contained Regimes, cit., p. 126). Among the more cautious authors is Simma himself, according to whom "... the general regime of State responsibility can only be again called to the foreground after all remedies provided in the 'subsystem' have been exhausted without any positive results and when further tolerance of the imbalance of costs and benefits caused by non-performance can no longer bona fide be expected from an injured party. Thus, not even in the case of EEC law do we find the total and final 'decoupling' of a 'self-contained regime' for the general rules" (B. Simma, Self-Contained Regimes, cit., pp. 128-9). A similar position is taken by Conforti, Commento art. 1, in Commentario CECA, vol. I, pp. 37-39. In the sense that resort to "self-help" measures would be justified when the Member State does not comply with its obligations following a judgment by the Court, see also P.S.G. Kaptein, Verloren van Themaat, Introduction to the Law of the European Communities after Accession of New Member States, London, 1973, p. 27.

100-101. It seems to follow that the EEC system does not concretize the hypothesis of a really self-contained regime: not, at least, for the purposes of the regime of countermeasures against violations under general international law. The claim that it would actually be legally impossible for the member States to "fall back" upon the measures afforded by general international law even in case of failure of the institutional EEC remedies does not seem to be really justified - at least from the viewpoint of general international law. It seems correct to believe - with White - that that claim rests upon a prevalence of "policy considerations" over "legal reasoning". 233/

102. Even less convincing are the other two examples of allegedly self-contained regimes: the rules on the protection of human rights and the rules on diplomatic relations and the status of diplomatic envoys. 234/

103. The "self-contained" regime of human rights would consist of conventional rules, more precisely of one or the other of the conventional systems in force at universal or regional level. 235/ The literature is divided but with a decided predominance, to the exception of writers of the Communist world, of the negative view. 236/ Some writers address themselves to the two less

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233/ G. White, Legal Consequences of Wrongful Acts in International Economic Law, in NYBL, vol. 16, 1985, p. 137 ff., at p. 162.

234/ Riphagen considered the three cases in question as instances of "objective regimes", Fourth Report on State Responsibility, cit., paras. 89-91.

235/ The discussion bears actually not so much upon the hypothesis of a single self-contained regime resulting from a combination of the various conventional human rights instruments but rather upon the hypothesis of a number of self-contained regimes, one for each one of the coexisting human rights "systems" (1966 Covenant, European Convention, etc.).

236/ According to Henkin, "The effort to create an international law of human rights has been largely a struggle to develop effective machinery to implement agreed norms. Arduous effort had not brought forth machinery of notable effectiveness. It would be ironic if the meagre successes in establishing such machinery should become the basis for interpreting the agreements as excluding other traditional means of enforcement, where they are most needed, and for denying them to States willing to use them ...". Furthermore "No human rights agreements, even those that establish elaborate enforcement machinery, expressly or by clear implication exclude the ordinary interstate remedies. In fact, the principal human rights agreements clearly imply the contrary: that every party to the agreements has a legal interest in having it observed by other parties and can invoke ordinary legal remedies to enforce it" (L. Henkin, Human Rights and Domestic Jurisdiction, in Human Rights, International Law and the Helsinki Accord, Buergenthal editor, p. 31). According to Simma,"... it has yet to be proved that ... a "decoupling" of human rights treaties from the enforcement processes of general international law was actually intended by the negotiating States. As long as such proof is not furnished one has to stick to the premise that multilateral treaties for the protection of human rights, like all other treaties, embody correlative

implausible hypotheses of a self-contained human rights regime: the United Nations Covenant on Civil and Political Rights "system" of 1966; and the European Human Rights Convention "system" of 1950. 237/

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rights and duties between the contracting parties uti singuli, resulting in a duty on each State to fulfil its obligations vis-à-vis all the others, and conversely, in a right for each party to demand compliance from every other party and, if necessary, to enforce it through countermeasures" (B. Simma, Self-Contained Regimes, cit., p. 133). According to Lattanzi, whenever the procedures provided for in the treaty do not manage to secure the respect of human rights ... States have no alternative but to resort to [the coercive] measures available to induce [the author State] to fulfil [its] obligations (F. Lattanzi, Garanzie dei diritti dell'uomo nel diritto internazionale generale, Milan, 1983, p. 261, footnote 41, our translation). And the Restatement of the Law Third, by the American Law Institute includes the following provision: "703. Remedies for Violation of Human Rights Obligations. (1) A State party to an international human rights agreement has, as against any other State party violating the agreement, the remedies generally available for violation of an international agreement, as well as (emphasis added) any special remedies provided by the agreement" (Restatement of the Law Third, Restatement of the Foreign Relations Law of the United States, vol. 2, p. 175. See also the "reporter's note" 2 at pp. 178-9).

Contra, together with a number of writers of the Communist world, Maddrey, according to whom "There are two barriers to the application of the law of reprisals to human rights enforcement. First, because there is a lack of consensus concerning the substantive norms of human rights law ... This uncertainty about the substantive content of human rights law and the binding nature of accepted norms makes it difficult to determine when a breach gives rise to a permissible reprisal.

Second, some jurists contend that under the customary law of reprisals only those States directly affected by an act of the offending State are allowed to take retaliatory action. Because human rights complaints involve a State's treatment of its own nationals, there is no direct injury to another State under traditional terms. Other jurists have argued that the breach of international law creates a public right of reprisal, one allowing all nations to take retaliatory action. But the lack of consensus on this point makes it difficult to determine when a right to intervene has arisen. With these two difficulties, therefore, the law of reprisals affords little legitimacy to unauthorized actions taken to promote human rights" (Maddrey, Economic Sanctions Against South Africa: Problems and Prospects for Enforcement of Human Rights Norms, in Virginia JIL, vol. 22, 1982, pp. 345 ff. at pp. 362-363). In the same sense, Frowein, cited by T. Meron, p. 229, note 305 as the principal representative of the view that the remedies envisaged by human rights instruments exclude resort to other means.

237/ According to Meron, in fact: "Whether a particular human rights treaty excludes remedies dehors the treaty depends ... not on abstract legal theory but on good faith interpretation of the terms of the treaty ..." (T. Meron, Human Rights and Humanitarian Norms as Customary Law, Oxford, 1989, p. 231).

104. The 1966 Civil and Political Rights Covenant has been considered in this context by Tomuschat, 238/ Meron, 239/ Simma, 240/ and others. We are inclined to share their view that the provision of Article 44 of the Covenant 241/ is sufficient to exclude that the 1966 Covenant "system" could properly qualify as a self-contained regime.

105. On the European Convention "system" - the most advanced among the existing human rights instruments - doctrinal positions are more cautious. The prevailing view is that also in this case the normal rights and remedies, namely the general international legal rights and remedies, are essentially

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238/ In Tomuschat's view, the hypothesis that Article 41 represents an exclusive arrangement excluding every other method for the implementation of the treaty should be expressly denied, because this would have the result that all the States which have not chosen to recognize the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Covenant, cannot be called to account for their conduct, except within the framework of the provision on the submission of reports. The burden of proof rests on those who maintain such a derogation (deviation) from general international legal rules (Ch. Tomuschat, Die Bundesrepublik Deutschland und die Menschenrechtspakte der Vereinten Nationen, in Vereinte Nationen, 1978, p. 8).

239/ According to this author, "In view of the rather limited nature of the settlement of disputes contained in the Political Covenant, it is not surprising that Article 44 of the Covenant liberally allows States parties that have recognized the competence of the Human Rights Committee with regard to interstate complaints under Article 41 to resort to other means of settling disputes concerning the Covenant's interpretation and application, including the ICJ" (T. Meron, Human Rights, cit., p. 232).

240/ B. Simma, Self-Contained Regimes, cit.

241/ Article 44 of the International Covenant on Civil and Political Rights reads: "The provisions for the implementation of the present Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialized agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force in between them".

intact. 242/ A sign to this effect is the provision of Article 62 of the Convention, under which (albeit under the title "special agreement") the right to resort to dispute settlement procedures other than those set up by the Convention is expressly envisaged. 243/ Also from this point of view the European system is open to general international remedies.

106. With reference to both human rights "systems" - and implicitly any similar instruments - the present Rapporteur himself has had occasion to affirm that the obligations they set forth therein "... are subject to the general rules of international law with regard to implementation, regardless of any ad hoc procedures made available to single individuals or groups, or to States themselves ...". 244/ And Henkin, always with reference to the procedures envisaged either by the 1966 Covenant or by the European Convention,

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242/ L. Henkin, Human Rights and Domestic Jurisdiction, cit., pp. 32-33. Simma believes, more generally that the presence of human rights instruments has not determined a "de-coupling" (of remedies) with general international law; he adds, however, that "In the case of a treaty like the European Convention which provides an effective system of individual and State complaints, the necessity of resorting to enforcement according to general international law will hardly ever arise" (B. Simma, Self-Contained Regimes, cit., p. 133). Meron, for his part, warns that "the European Convention on Human Rights, which establishes a very effective settlement of disputes system, explicitely excludes resort to means of settlement dehors the Convention, such as the International Court of Justice or United Nations human rights organs. Article 62 of the Convention provides that States parties, 'except by special agreement', may submit disputes concerning the interpretation or application of the Convention only to a means of settlement provided in the Convention". The same writer, however, states that the "inclusion of Article 62 in the Convention indicates the drafters' understanding that, in absence of this provision, States parties would be permitted to use settlement of disputes procedures dehors the Convention (T. Meron, Human Rights, cit., pp. 232-3).

243/ This Article reads: "The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of a petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention."

244/ G. Arangio-Ruiz, Human Rights and Non-Intervention in the Helsinki Final Act, Hague Rec., 1977-IV, p. 247.

states that they were clearly intended to supplement not to supplant general remedies available to one party against violation by another ...". 245/

107. The study of some recent cases seems to lend support to the view that there is no such thing as a universal or regional self-contained regime for human rights. 246/ The only difficulty with the said cases is that it is not

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245/ L. Henkin, Human Rights and Domestic Jurisdiction, cit., p. 31. It is not without interest, as regards in particular the allegedly self-contained regime represented by the system of the European Convention on Human Rights that the European Human Rights Court applies the provisions of the Convention concerning the substantive consequences of violations (notably Article 50) as embodying the general rules of international law governing such consequences (F. Lattanzi, Garanzie, cit., pp. 207 ff. and 236 ff). See the cases Engel of 23 November 1976 (Publications de la Cour, Série A, vol. 22, p. 70); Deweer of 27 February 1980 (ibid., vol. 35, p. 31); König of 10 March 1980 (ibid., vol. 36, p. 20); Artico of 13 May 1980 (ibid., vol. 37, p. 22); and others.

246/ Following the murder in Washington of the former Chilean Foreign Minister by Chilean officers, the United States suspended in 1976 the military assistance agreement with Chile (Case quoted in F. Lattanzi, Garanzie, cit., pp. 322-324). A year before Mexico suspended consular relations with Spain following the condemnation of eleven ETA separatists (RGDIP, vol. 80, 1976, pp. 590 ff., at 595). Countermeasures stricto sensu seem also to have been involved in the French decision of 23 May 1979, to suspend any form of military assistance to the Central African Empire - a State party to the 1966 Covenant - following the execution on 15 May of that year of 85 young people by Emperor Bokassa's "garde". On 17 August 1979, following confirmation of the fact by a Commission of five African magistrates, France extended its measure to any financial assistance to the Empire (except for the food, medical and educational assistance programmes) (CH. Rousseau, Chronique, in RGDIP, vol. 84, 1980, pp. 363-4 and F. Lattanzi, Garanzie, cit., p. 322). A countermeasure in a proper sense was also taken by the Netherlands Government when it suspended all the agreements in face with Suriname - a State party to the 1966 Covenant - following the unexplained death, a week before, of 15 prominent figures in that country. The Dutch Minister for Cooperation and Development declared in Parliament in August 1983 that "Before terminating this suspension [of agreements with Suriname], the Netherlands Government expects Suriname to take positive steps towards the restoration of democracy and law and order, respecting at the same time fundamental human rights and providing structures capable of preventing a recurrence of what happened in December 1982" (Netherlands State Practice, 6.4341, in NYBIL, vol. 15, 1984, p. 321).

Also of interest is the statement of a spokesman of the Federal Republic of Germany (1982), according to which: "Der internationale Pakt über bürgerliche und politische Rechte ist ein völkerrechtlicher Vertrag, auf den die Regeln über völkerrechtliche Verträge Anwendung finden. Nach diesen Regeln richten sich die Rechte und Pflichten der Vertragsparteien in erster Linie nach den in dem Vertrag selbst getroffenen Bestimmungen. Dies gilt auch für den Fall der Nichterfüllung von Verpflichtungen. Argänzend kommt das

always easy to distinguish cases of countermeasures stricto sensu and cases of mere retorsion. 247/

108. Inconclusive, from the point of view of the existence of a (regional) self-contained regime, is also paragraph 267 of the ICJ's judgment in the Military and Paramilitary Activities in and against Nicaragua case. With regard to charges of human rights violations by Nicaragua, the Court stated, inter alia, that "... where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves". It is further stated that:

> "[t]he political pledge by Nicaragua [to respect human rights] was made in the context of the Organization of American States, the organs of which were consequently entitled to monitor its observance. The Court has noted above (paragraph 168) that the Nicaraguan Government has since 1979 ratified a number of international instruments on human rights, and one of these was the American Convention on Human Rights (the Pact of San José, Costarica). The mechanisms provided for therein have functioned. The Inter-American Commission on Human Rights in fact took action and compiled two reports (...) following visits by the Commission to Nicaragua at the Government's invitation. Consequently, the Organization was in a position, if it so wished, to take a decision on the basis of these reports". 248/

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allgemeine Völkerrecht zur Anwendung" (Bundestags-Drucksache 9/1981, p. 2 - cited in B. Simma, Self-Contained Regimes, cit., p. 134.

247/ As recalled by Lattanzi, Anzilotti saw the issue in the clearest terms long before the proliferation of human rights instruments "[R]ien ne s'oppose et les exemples ne manquent pas - he wrote in 1906 - à ce que un Etat s'oblige envers d'autres Etats à traiter ses propres sujets d'une manière déterminée, en leur octroyant notamment certains droits. L'Etat, alors, est internationalement tenu de se comporter envers ses nationaux de la façon promise; le refus de leur accorder les droits annoncés constituerait un défaut d'exécution de l'obligation, qui autoriserait les Etats envers lesquels l'engagement a été pris à en réclamer l'accomplissement par tous les moyens du droit international" ["There is nothing to prevent a State and there are all too many examples of this - he wrote in 1906 - from entering into an undertaking with other States to treat its own subjects in a given way, in particular by granting them certain rights. The State is then internationally bound to conduct itself towards its nationals as promised; refusal to grant them the rights stated would amount to failure to perform the obligation, and this would entitle the States with which the undertaking was entered into to call for it to be performed by all means available under international law"](La responsabilité internationale des Etats à raison des dommager soufferts par des étrangers, in RGDIP, vol. 13, 1906, p. 10).

248/ ICJ Reports, 1986.

Nothing is said here about a "self-contained" Inter-American human rights regime, not in the sense, in any case, of a "closed legal circuit". There is simply the acknowledgement of the existence of regional human rights arrangements and mechanisms; and the very fact of stressing that such arrangements and mechanisms had functioned seems to imply that a fall-back on general remedies would have followed had it been otherwise.

109. Another hypothesis of allegedly self-contained regime would be, according to a possible interpretation of a dictum of the ICJ, the law of diplomatic relations and in particular of the privileges and immunities of diplomatic envoys and premises.

110. According to the said dictum in the Hostages case, the "rules of diplomatic law ... constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse. These means are, by their nature, entirely efficacious". 249/ It seemed to follow, according to the Court, that a State injured by a violation of another State's duty in the field of diplomatic relations could only "employ the remedies placed at its disposal by diplomatic law specifically". 250/

111. Nevertheless, doubts over the self-contained nature of diplomatic law have been expressed from many parts. 251/ The most convincing is the theory according to which any real restrictions of, so to speak, "diplomatic" countermeasures derive not from any "specialty" of diplomatic law, but simply from the normal application, in the area of diplomatic law, of the general rules and principles constituting the regime of countermeasures, namely of the various kinds of general restrictions, of the absolute restriction of jus cogens, of the restrictions imposed by the respect for human rights and

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249/ United States Diplomatic and Consular Staff in Tehran, ICJ Reports, 1980, p. 3, at p. 38.

250/ Ibid. at p. 40.

251/ According to Simma "... there is no question that serious breaches of diplomatic law such as, for instance, acts of State terrorism committed by means of diplomatic agents, may justify countermeasures (reprisals) in the form of suspension of obligations towards the violator in other fields. Therefore, even if one agrees with the opinion of the Court that countermeasures to abuses of diplomatic immunity may not affect the immunity of the diplomats concerned, this legal construction can be labelled 'self-contained' only in a very narrow sense" (B. Simma, Self-Contained Regimes, cit., p. 121). And Tomuschat has stated in the ILC that "... only a hard core of the immunities of diplomatic and consular missions and staff should be protected ... other immunities might be legitimately restricted by way of reciprocity or reprisal" (YBILC, vol. I, 1985, p. 126).

possibly from specific restrictions deriving from given rules of the law of diplomatic relations. This is the position taken by Simma 252/ and, to a certain extent, Dominicé. 253/

112. In his comment to draft article 2, paragraph 1, our predecessor suggests that an example of a possible derogation from the general regime could be a customs tariff treaty establishing the consequences of the violation of its own rules: this in derogation from the general rules on the consequences of internationally wrongful acts. This would presumably be the case - if we understand Professor Riphagen's position correctly - of the General Agreement on Tariffs and Trade (GATT). Articles XXIII, XII, XIX and XXVIII affect countermeasures, respectively, with regard to settlement of disputes (Article XXIII), quantitative restrictions to imports in violation of the Agreement (Article XII), safeguards (Article XIX) and the modification of tariff concessions (Article XXVIII). While Riphagen seems to envisage here not so much a self-contained regime, but just a number of conventional "derogations" from general rules, the concept of self-contained regimes might seem to be evoked, in connection with GATT, in a recent work on countermeasures in international economic relations. According to its author:

> "[l]e respect des dispositions de l'Accord général ne permet pas à un Etat de manquer respect de ses engagements au titre d'un exercice de contre-mesure à l'encontre d'un autre Etat partie au GATT, en dehors des hypothèses prévues par l'Accordgénéral. En effet, les possibilités d'exercice de contre-mesures à l'encontre d'Etats auxquels est attribuable un fait qui relève du domaine d'application de l'Accord général et qui puisse être générateur d'un exercice de contre-mesures sont strictement délimitées et réglementées, ce qui rend illicite tout exercice de mesures prétendument contre-mesures et qui ne serait pas conforme aux prescriptions de l'Accord général ...". ["Observance of the provisions of the General Agreement does not entitle a State to fail to observe its commitments because of the application of a countermeasure against another State party to GATT, save in the cases specified in the General Agreement. The possibilities for the application of countermeasures against States to which is attributed an act that falls within the scope of the General agreement and that may give rise to the application of countermeasures are strictly circumscribed and regulated,

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252/ "[I]t is indeed to the general limits of countermeasures to internationally wrongful acts that the Commission, in this writer's opinion, should also subject the secondary rules of diplomatic law: i.e. proportionality, jus cogens and the higher law of the UN Charter" (B. Simma, Self-Contained Regimes, cit., p. 122).

253/ "[P]our affirmer qu'une violation initiale du droit diplomatique ne peut en aucune manière autoriser l'Etat qui en est la victime à le transgresser, à son tour, l'argument du régime se suffisant à lui-même n'est pas nécessaire" ["In order to state that an initial violation of diplomatic

and this renders unlawful any application of measures alleged to be countermeasures which is not in accordance with the terms of the General Agreement ..."] 254/

The prohibition of countermeasures other than those contemplated in the Agreement would apply in the relations between the contracting States also to the suspension of compliance with one or more GATT obligations by way of reaction against the violation of international obligations other than those deriving from GATT itself. Subject, however, to further study, the GATT "system" does not seem to constitute a really self-contained regime. The cited writer herself seems to acknowledge this when she notes that the participating States do resort, in some cases, to "mesures adoptées en dehors de tout cadre réglementaire, tellesque les mesures dites de la zone grise et les accord d'auto-limitation". ["measures adopted outside any regulatory framework, such as the so-called grey area measures and voluntary restraint agreements"] 255/ This would indicate that the GATT "system" is really not a self-contained regime in the sense in which our predecessor seems to have used that expression.

113. In conclusion, none of the hypotheses of a self-contained regime seems to materialize in concreto. Furthermore, the analysis of those hypotheses leads us to formulate the most serious doubts with regard to the very admissibility in abstracto of the concept of self-contained regimes as "subsystems" of the law of State responsibility or - to use the language of our distinguished predecessor - "closed legal circuit(s)" for "particular field(s) of factual relationships", such as those created by the law of human rights, the law of diplomatic relations, the law of tariffs and trade or the law of the EEC. To be sure, any substantive rules or any more or less articulate and organized set of such rules may well introduce, in view of the possibility of their violation, provisions intended better to regulate the consequences thereof. This with the purpose of "rendering the response of the injured party more certain and violations therefore more prohibitive, or of limiting the response and thus avoiding excessive reaction, counter-reaction, and the eventual breakdown" of the rules or set of rules in question. 256/ In some of the

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law can on no account authorize the victim State, in its turn, to break that law, the self-contained regime argument is not necessary"] (CH. Dominicé, Représailles et droit diplomatique, in Recht als Prozess und Gefüge - Festschrift für Hans Hüber zum 80 Geburstag, Berlin, 1981).

254/ L. Boisson de Chazournes, Les contre-mesures dans les relations internationales économiques, doctoral thesis, University of Geneva, 1990, p. 148.

255/ L. Boisson de Chazournes, Les contre-mesures, cit., p. 63.

256/ The cited passage is used by Simma with reference to the special regime of suspension and termination of treaties in the Vienna Convention (B. Simma, Reflections on Article 60 of the Vienna Convention, Ozor, vol. 20, 1970, pp. 5-83, p. 82)

cases considered, the aim pursued may be either to achieve a more effective, organized monitoring of violations and response thereto by ad hoc machinery (as in some human rights instruments and some international institutions) or to avoid that a reaction to a violation defeat the more general purpose of the breached rule (as in the rules on the protection of diplomatic envoys). In so doing, the rules or sets of rules in question do not exclude the validity and operation of the rules of general international law governing the consequences (substantive or instrumental) of internationally wrongful acts. The special, ad hoc rules merely represent contractual (or, perhaps, customary) law derogations from the said general rules, such derogations being admissible in the measure in which they are not incompatible with the latter. No derogation could indeed be conceivable - unless the implementation of the rules in question brought about a degree of union that would lead to the loss of the international legal personality of the participating States and their integration within a "national" (constitutional) system - to those essential rules and principles on the consequences of internationally wrongful acts that are inherent in the very nature of international relations and international law. No conventional provisions would be admissible, in particular, that would involve derogation from the prohibition of the use of force, from the rule of respect of fundamental rights, from the basic exigencies of diplomatic relations, from other peremptory rules of general international law, from the duty to respect the rights of "third" States, from the principle of proportionality or from the rule under which the lawfulness of any unilateral measure must be assessed in the light of that measure's ultimate legal function. Within the framework of such principles and rules States find no obstacle to establish, bilaterally or multilaterally, special mechanisms envisaging particular measures or sanctions, either in response to wrongful acts involving the infringement of the rules set forth in the same instrument or in response to any internationally wrongful act if the contemplated particular measures or sanctions affect in any way the instrument in question.

114. It follows that whenever an injured State finds itself in a position to avail itself of the measures envisaged in a given conventional instrument - and consisting precisely in an infringement thereof - it will be entitled to do so simply on the strength of the relevant instrument. The question will not arise whether the measure in question is proportional under the general principle or has been preceded by a demand of reparation or sommation in conformity with the general rules. It will suffice to verify whether the measure is admissible in the situation under the relevant instrument, the target State being of course a party thereto. This may also happen - subject to respect for jus cogens - in derogation from the general rules of the law of treaties on suspension and termination of multilateral treaties.

115. However, it seems reasonable to assume in particular that a State joining a so-called "self-contained" regime does not thereby restrict - by a kind of autolimitation - the rights or facultés of unilateral reaction it possesses under general international law to such an extent as to render the accepted "regime" unsusceptible of derogation or integration. Of course, any State accepting the "regime" shall be bound, when confronted with a breach of a "regime's" obligation on the part of another participating State, to react - if it wishes to react - first of all in conformity with the provisions of the relevant "regime". This does not exclude, however, that a certain room for

general law measures remain, the width of such room depending on the degree of availability and effectiveness of the remedies envisaged by the conventional "regime". 257/

116. Two main hypotheses are conceivable in which the possibility of "fall-back" is and should remain open:

(i) The first hypothesis is that the State injured by a violation of the system resorts to the system's institutions, secures a favourable pronouncement but does not manage to obtain, through the system's procedures, the reparation it is entitled to under the decision. Clearly, as long as the law-breaking State does not comply in full with its obligations, the injured State may lawfully resort to measures which, although not covered by the "system", are available to it (with the relevant limitations) under general international law;

(ii) A second hypothesis occurs when the internationally wrongful act consists in a violation of the "régime" which is still in progress. In this case too, the injured State is under an obligation - except of course where it would be entitled to act in self-defence - to go in the first place through the conventionally agreed procedures. However, if the unlawful conduct persists while these procedures are in progress - and in spite of any interim measures afforded thereby - the injured State may lawfully resort simultaneously to any "external" unilateral measures which may be appropriate to protect its primary or secondary rights without endangering the "just" solution of the conflict which could be afforded by the "system".

117. It should be added nevertheless, with regard to both hypotheses, that each one of the States participating in a "régime" has presumably considered the legal rights and obligations covered by the "régime" - and the very integrity of the latter - as a bien juridique of high importance. Consequently, any derogation from the "régime" not contemplated by the "régime" itself should be evaluated as highly exceptional. Any "external" unilateral measures should thus be resorted to only in extreme cases, namely, only in response to wrongful acts of such gravity as would justify a reaction susceptible of jeopardizing a bien juridique very highly valued by both the injured and the law-breaking State. In other words, the principle of proportionality will have to be applied in a very special way - and very strictly - whenever the measure resorted to were to consist in the suspension or termination of obligations deriving from an allegedly "self-contained" regime.

118. Finally, it should be stressed again that normally a "self-contained" regime would be established by a multilateral treaty. This implies that, as in the case of any multilateral treaty, suspension or termination by way of countermeasure may be lawfully resorted to only under the general proviso that it does not cause prejudice to the rights of the participating States other than the law-breaking State or States. In this respect also - as with respect

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257/ The situation is not dissimilar from that of a State which is bound, vis-à-vis the law-breaking State, by specific, bilateral obligations to submit to given dispute settlement procedures (to which it should resort) in the first place following unfruitful demand or sommation.

to proportionality - it seems reasonable to believe that the very fact that States participate in a special regime emphasizes the restriction in question, in the sense that each party to the regime would have acquired something more than a merely factual interest in the proper compliance with the regime by all parties and in every circumstance.

119. The considerations set forth in the preceding paragraphs lead us to believe that it would be inappropriate, in codifying the law on State responsibility to contemplate provisions placing "special" restrictions upon measures consisting in the suspension or termination of obligations arising from treaties creating special regimes or international organizations. A correct interpretation and application of the general rules governing any unilateral measure - including measures affecting compliance with written or unwritten erga omnes obligations - should, in our view, be sufficient to cover the problems which may arise from treaties establishing international organizations or any allegedly "self-contained" regimes.

120. For reasons analogous to those that lead us to doubt strongly the concept of "self-contained" regimes (or "closed legal circuits") we entertain serious perplexities with regard to draft article 2 of Part Two as adopted on first reading. The connection of the object of that draft article with the problem of allegedly self-contained or otherwise special regimes suggests that we do not leave that draft article aside until the stage of its second reading.

121. Draft article 2 asserts the residual nature of the whole of Part Two, namely the fact that the rules set forth in that Part are to apply only on the condition and to the extent to which the consequences of an internationally wrongful act are not "determined by other rules of international law relating specifically to the internationally wrongful act in question". This provision is derived from Professor Riphagen's belief in the existence, within the framework of international law, of the "self-contained" regimes discussed in the preceding paragraphs of the present Chapter and from his related belief that the rules of such regimes or systems governing the consequences of the breaches of obligations deriving therefrom would exclude, within the relevant area, the operation of the general rules on the consequences of internationally wrongful acts. 258/

122. Although a few members did express some doubts during the debate on the proposal, 259/ the adoption of the draft article indicates that the idea was generally accepted by the Commission. 260/

258/ W. Riphagen, Third Report on State Responsibility, YBILC 1982, vol. II (Part One), paras. 52-77; Sixth Report on State Responsibility, YBILC 1985, vol. II (Part One), comment to Article 2; nonché YBILC 1982, vol. I, 1731st meeting, paras. 16-23 e YBILC 1984, vol. I, 1858th meeting, paras. 3-9.

259/ Against the Article were Ouchakov (YBILC 1982, vol. I, 1735th meeting, para. 47) and Yankov (ibid., 1737th meeting, para. 15). Doubts on the notion of "sub-systems" and on the excessive scope of draft Article 2 were also espressed by Calero Rodriguez (ibid., 1736th meeting, paras. 22-24).

260/ YBILC 1983, vol. II (Part Two), pp. 42-43. More perplexity was raised by the formulation in the Sixth Committee. It was stressed by a number of speakers that too many derogations would deprive the project of its interest (Doc. A/C.6/37, especially the representatives of Greece (SR.40), Brazil (SR.43), France (SR.38) and Iraq (SR.50)

123. According to the general terms in which draft article 2 refers to "any other rules of international law", it would seem that the special regimes that would enjoy, so to speak, an exclusiveness in the regulation of the consequences of internationally wrongful acts, could consist not only of treaty but also of unwritten customary rules. With regard to unwritten law, however, we find it difficult to see which the rules of this kind could be and how the special regime they create would relate to the rules to be codified by the ILC. The examples of special customary law regimes indicated by Riphagen would be, if we are not mistaken, in addition to the rules condemning international crimes of States, the respect for human rights, the safeguard of the environment as a "shared resource" and diplomatic immunities. 261/ As already explained in this Chapter 262/ and as recognized by Professor Riphagen himself 263/ respect for human rights and diplomatic immunities are not the object, under unwritten law, of any special forms of international responsibility. On the contrary, the consequences of the violations of human rights or diplomatic law rules - whether substantive or instrumental - are subject to the same restrictions deriving either from the absolute limitations to countermeasures or from the general requirement of compatibility with jus cogens. As for the protection of the environment, we feel unable to see in what sense the present state of international practice may justify either the assumption that it is already covered by a special regime of customary, unwritten law or that a special regime of the same nature maybe envisaged as being around the corner. As a recent contribution to the topic has well demonstrated 264/ - and as pointed out in the following Chapter of the present Report 265/ - there are no peculiarities in the regulation of the legal consequences of internationally wrongful acts affecting the environment that are not in some way covered by the application of the general norms and principles on international responsibility. As regards finally international crimes, the regime of their consequences - in the measure in which it may have to be singled out as special as compared with the regime of other internationally wrongful acts of States - has been supposed so far to be provided for within the framework of the Commission's project currently under

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261/ W. Riphagen, Fourth Report on State Responsibility, YBILC, 1983, vol. II (Part One), paras. 89-91

262/ See, supra, paras. 102-110.

263/ W. Riphagen, Fourth Report on State Responsibility, cit., paras. 89 and 91; Sixth Report on State Responsibility, cit., Articles 11 paragraph 1 (c) and 12 paragraph (b); - with the comments thereto.

264/ M. Spinedi, Les consequences juridiques d'un fait internationalement illicite causant un dommage à l'environnement, in International Responsibility for Environmental Harm (Francioni-Sconazzi, eds.), London-Dordrecht-Boston, 1991, pp.75 ff.

265/ See, infra., paras. 140-152.

way, notably as an integral portion of Parts Two and Three. It appears, in conclusion, that there is not a single area of international legal relations which is the object of a special regime of unwritten rules on State responsibility justifying a provision which, like the one presently embodied in article 2, would label the general rules the ILC works out (on State responsibility) as merely residual rules.

124. But draft article 2 is questionable, at least in its present formulation, with respect to conventional rules also. Surely, it would be perfectly correct to say in that article - although it should go without saying - that the general rules to be set forth in Part Two are not unsusceptible of derogation. Of course, States may well derogate from them by treaty. This is a normal feature of any rule of international law which is not a peremptory rule. The tenor of article 2, however, seems to go beyond that obvious statement. According to its present text, article 2 states that the general rules set forth in Part Two would be inapplicable whenever and to the extent that the legal consequences of a given internationally wrongful act were determined by "other rules of international law". To confine ourselves now to the hypothesis of treaty law, article 2 would mean, according to its tenor, that whenever a treaty determines the legal consequences of one or more given internationally wrongful acts - for example, the violations of the obligations set forth by that treaty - the rules of Part Two would no longer come into play. Each one of the States participating in such a treaty would automatically altogether exclude the application of the general rules as codified: and this by virtue of an article - draft article 2 - inserted within the very codification convention in which those general rules are to be embodied. Such a sweeping consequence calls for further reflection by the Commission.

125. As already mentioned, the aim pursued by States when they introduce within a treaty special rules governing the consequences of its violation, is not to exclude, in their mutual relations, the rights, the obligations, the facultés - briefly, the guarantees - deriving, for each of them vis-à-vis each one of the others, from the normal operation of the general rules on State responsibility. The aim pursued, on the contrary, is to strengthen the normal, inorganic and not always satisfactory guarantees of general law by making them more dependable and effective, either by means of institutional devices or, failing that, by means of more precise stipulations: but without renouncing, in any case, the possibility of "falling back", in hypotheses like those considered (in para. 116 above), on less developed, "natural" guarantees. A presumption of total abandonment of the latter, such as the one presently expressed in draft article 2, seems thus to be doubly objectionable. On the one hand it defeats the purpose of any States establishing special regimes by attributing unintended derogatory effects to their agreement. On the other hand, it appears to defeat, by making the general rules "residual", the very purpose of the codification and progressive development of the law of State responsibility undertaken by the General Assembly through the Commission.

126. If a provision such as that of draft article 2 were really to be maintained among the draft articles - a matter which we strongly doubt - it should be qualified by the addition of at least three limitations:

(i) The first, to be embodied in the text of the article, should be the specification that the derogation from the general rules set forth in the draft articles is a derogation deriving from contractual instruments (and not from unwritten, customary rules);

(ii) The second point - also to be included in the text itself - should be that for a real derogation from the general rules to take effect, the parties to the instrument should not confine themselves to envisage more or less exhaustively the consequences of the violation of the regime; they should expressly indicate that by entering the conventional system they exclude the application of given or all the general rules of international law on the consequences of internationally wrongful acts;

(iii) The third point of clarification could be confined to the comment to the draft article: and it should be to the effect that, despite point (ii), the effects of the conventional derogation would not survive a violation of the system which were of such gravity and magnitude as to justify, as a proportional measure against the law-breaking State, the suspension or termination of the conventional system as a whole. By disengaging itself (temporarily or permanently) from the system, 266/ injured State would be at liberty to pursue its so-called "secondary" rights as set forth - and by the means of redress set forth - in the general rules.

127. Reasons partly coinciding with and partly transcending those indicated in paragraphs 120 to 126 above induce us to feel that draft article 4 also (as adopted on first reading) may call for some further reflections. These will be the object, if necessary, of a further brief Addendum.

266/ A possibility contemplated by paragraphs (1) and (2) (b) and (c) of Article 60 of the Vienna Convention on the Law of Treaties

CHAPTER VIII. THE PROBLEM OF A PLURALITY OF EQUALLY OR UNEQUALLY INJURED STATES

A. The Origin of the Concept of Non-Directly Injured States

128. As indicated in Chapter IX of the Third Report, this Special Rapporteur was not convinced of the accuracy of the concept of "non directly" injured or "non directly" affected States. 267/ On further reflection, he now finds that the concept is unacceptable.

129. Within the Commission and the Sixth Committee the concept of "non directly" injured States emerged in 1984, in relation to the definition of injured State. It had been prompted by some of the thoughts put forward by our predecessor in his presentation of the draft article that was to become article 5 of the project as adopted on first reading. 268/ Thereafter, the concept seems to have gained some credit in the literature 269/ where it was

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267/ Third Report, cit., paras. 89-95, especially paras. 90 and 95.

268/ W. Riphagen, Fourth Report on State Responsibility, in YBILC 1983, vol. II (Part One), paras. 31 ff., and Sixth Report on State Responsibility, in YBILC 1985, vol. II (Part One), comment to Article 5. See the text of Article 5 as adopted on first reading in YBILC, 1985, vol. II (Part Two), p. 25.

The following members of the Commission were in favour of the distinction between "directly injured or affected" States and "indirectly injured or affected" States with respect to paras. (e) and (f) of Article 5: in 1984, Sinclair (1865th meeting) and Lacleta Munoz (1867th meeting); in 1985, Flitan (1892nd meeting), Ogiso (1996th meeting), Tomuschat (ibid.), Jagota (1901st meeting). Within the Sixth Committee of the General Assembly, the need to distinguish between "directly" or "indirectly injured States" for the purposes of the legal consequences of an internationally wrongful act was stressed by the representatives of the Federal Republic of Germany (A/C.6/39 SR.36, and A/C.6/40 SR.24), Afghanistan (A/C.6/39 SR.42), Romania (A/C.6/39 SR.43), the German Democratic Republic (A/C.6/39 SR.45), Bulgaria (A/C.6/40 SR.27), Viet Nam (A/C.6/40 SR.27), Czechoslovakia (A/C.6/40 SR.29), New Zealand (A/C.6/40 SR.31) and France (A/C.6/40 SR.34).

269/ Some authors have recently dealt with the consequences of unlawful acts, and especially of violations of erga omnes or erga omnes partes obligations, distinguishing between the rights and facultés of the injured party on the basis of whether it was a "directly" or "indirectly injured State". See, B.G. Ramcharan, State Responsibility in respect of Violation of Treaty Rules in General, and of those Creating an "Objective Regime" in Particular: Specific Features with regard to the "First, Second and Third Parameters", in IJIL, 1986, pp. 1 ff.; D.N. Hutchinson, Solidarity and Breaches of Multilateral Treaties, in BYIL, vol. 59, 1988, pp. 151 ff.;

preferred to the term "third" States, which had also been used in the same regard. 270/ "Third" States being States extraneous to a legal relationship, we have already discarded this term ictu oculi as inappropriate. 271/ The terminology "non directly" injured or affected State, however, is not any better. It appears to be very ambiguous particularly in the light of a logical understanding of the definition of injured State presumably espoused by the Commission.

130. An essential element of the definition of injured State - more or less satisfactorily reflected in the formulation of article 5 - is that an internationally wrongful act consists not just or not necessarily in inflicting an unjust physical damage. More broadly, it consists of or results in the infringement of a right, such infringement constituting - with or without damage - the injury. 272/ This is in conformity with the meaning of "a breach of an obligation" in article 3 (b) of Part One of the draft and with the significant absence in that article of any reference to damage as an element or effect of a wrongful act. A State can thus be injured by the breach of an international obligation even if it did not suffer any damage

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K. Sachariew, State Responsibility for Multilateral Treaty Violations: Identifying the "Injured State" and its Legal Status, in NILR, vol. 35, 1988, pp. 273 ff.; B. Simma, "Bilateralism and Community Interest in the Law of State Responsibility, Essays Rosenne, Dordrecht, 1989, p. 821 ff.; M. Spinedi, Les conséquences juridiques d'un fait internationalement illicite causant un dommage à l'environnement, in International Responsibility for Environmental Harm (F. Francioni, T. Scovazzi, eds.), London-Dordrecht-Boston, 1991, pp. 75 ff.; Cardona Llorens, Deberes jurídicos y responsabilidad internacional, Essays in Honour of Manuel Diez de Velasco Vallejo (presently being printed). The latter author, however, believes that it would be correct to consider the States in question not as "indirectly injured" by the breach of an obligation (and the corresponding right) but as entitled to react to the breach of an international "duty".

270/ J.I. Charney, Third State remedies in International Law, in MJIL, 1989, pp. 57 ff., and Third State Remedies for Environmental Damage to the World's Common Spaces, in International Responsibility for Environmental Harm (F. Francioni, T. Scovazzi, eds.), London-Dordrecht-Boston 1991, pp. 149 ff.

271/ Third Report, cit., para. 90.

272/ We will take the liberty of recalling what we pointed out within the Sixth Committee in 1985: "Article 5, as provisionally adopted, was not intended to be more than a general definition of the States which, by the fact of possessing the right corresponding to the obligation, non-compliance with which constituted the wrongful act, were legally affected by the act". (A/C.6/40/SR.27).

other than the infringement of its right. 273/ In each particular case the essential point in order to identify the "injured State or States" for the purposes of the legal consequences of an internationally wrongful act is, therefore, to determine which State or States have suffered an infringement of their right.

131. According to the traditional view, all international obligations are structurally such that, even when they are established by a multilateral treaty or a customary rule, their violation in any concrete case infringes the right of only one or of a few given States. Recent developments, however, seem to indicate that this may not necessarily be true. A distinction appears to have emerged. Certainly, the majority of international rules still set forth - as the majority of the rules of the private law of national societies - obligations of the traditional kind: obligations the violation of which only affects the right of one or more given States. This applies both to the rules of bilateral treaties as well as to most rules of multilateral treaties or customary law. With regard to multilateral rules it has been suggested that they address a plurality of States but create legal relationships (obligation/right relationships) "dont chacun des destinataires de la norme est titulaire envers unseulement des autres destinataires". 274/ In other words, despite the multilateral sphere of action of the rule, it only creates bilateral relationships. It is precisely this kind of obligations - and the corresponding rights - to which reference is made, in subparagraphs (a)-(e) i of paragraph 2 of article 5 as adopted on first reading, for the purposes of the definition of injured States.

132. On the other hand, a number of signs in the practice and literature of international law indicate that there are also rules apparently escaping the abovementioned pattern of bilateralism. These are the rules which, in the pursuit of "general" or "collective" interests, create obligations compliance with which is in the legally protected interest - and in that sense the legal right - of all the States to which the rule is addressed. According to one

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273/ As was rightly observed by P. Reuter: "In draft Article 5, the Special Rapporteur had endeavoured to follow the guidelines laid down in part 1 of the draft. Injury was not a constituent element of responsibility and account had been taken only of legal, abstract injury resulting from any breach of an international obligation". (YBILC, 1984, vol. I, 1861st meeting, para. 10).

274/ M. Spinedi, Les conséquences juridiques, cit., p. 88, citing G. Morelli, A proposito di norme internazionali cogenti, in RDI, vol. 51, 1968, p. 1145.

author, "[o]n a parlé, à cet égard, de normes qui ont pour objet la tutelle d'intérêts qui sont simultanément propres à tous les Etats, ou à tous les Etats composant une collectivité donnée, et non pas à chacun d'eux pris séparément" ["mention has been made in this connection of rules whose object is to safeguard interests that belong to all States simultaneously or to all the States of which a given body is composed, and not to each one separately"]. 275/ The objects covered by such rules include, for example, disarmament and arms control, promotion and respect for human rights, safeguard of the environment in general and in areas not falling within the jurisdiction of any State. According to the same author, "[c]es normes imposent à chaque Etat des obligations envers tous les autres Etats, chacun desquels est titulaire du droit subjectif correspondant. La violation de ces obligations lèse simultanément les droits subjectifs de tous les Etats liés par la norme, qu'ils aient ou non été spécialement atteints; - à l'exception, naturellement, du droit subjectif de l'Etat auteur de la violation. Pour désigner les obligations dont il s'agit on emploie généralement l'expression 'obligation erga omnes'" ["these rules impose on every State obligations towards all the other States, in each of which the corresponding subjective right is vested. A breach of these obligations injures simultaneously the subjective rights of all the States bound by the rule, whether or not they have been especially affected - apart, of course, from the subjective right of the State that committed the breach. To denote the obligations in question, the term 'erga omnes obligation' is generally used"]. 276/ The provisions of

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275/ M. Spinedi, Les conséquences juridiques, cit., pp. 88-89.

276/ Ibid., p. 89. On the structure and contents of such norms, see the ICJ's statements in its Advisory Opinion on the Reservations to the Genocide Convention (ICJ Reports, 1951, p. 23) and its decision in the case Concerning the Barcelona Traction, Light and Power Company, Limited (ICJ Reports, 1970, p. 32). As regards the doctrine, see, G. Morelli, A proposito, cit.; Juste Ruiz, Las obligaciones 'erga omnes' en derecho internacional público, in Estudios de derecho internacional, Homenaje al Profesor Miaja de la Muela, vol. I, Madrid 1979, pp. 219 ff.; P. Picone, Obblighi reciproci e obblighi erga omnes degli Stati nel campo della protezione dell'ambiente marino dall'inquinamento, in Diritto internazionale e protezione dell'ambiente marino (a cura di V. Starace), Milano 1983, pp. 15 ff.; F.Lattanzi, Garanzie dei diritti dell'uomo nel diritto internazionale generale, Milano 1983, pp. 97-149: G. Sperduti, Les obligations solidaires en Droit International, in Etudes en l'honneur du Juge Manfred Lachs, 1984, pp. 271 ff.; D.N. Hutchinson, Solidarity and Breaches of Multilateral Treaties, cit., pp. 151 ff.; G. Gaja, Obligations Erga Omnes, International Crimes and Jus Cogens: A tentative Analysis of Three Related Concepts, in International Crimes of States (Weiler-Cassese-Spinedi eds.), Berlin-New York 1989, pp. 151 ff.; Restatement of Law (Third), ALI 1987, pp. 339 e 342-343; J. Cardona Llorens, Interés, interés jurídico y derecho subjetivo en Derecho Internacional público, in Estudios en recuerdo de la Profesora Sylvia Romeu Alfaro, Valencia 1989, pp. 231 ff.; A.L. Sicilianos, Les réaction décentralisées à l'illicite: des contre-mesures à la légitime défense, Paris 1991, pp. 103 ff.

paragraphs 2 (e) ii, iii, (f) and 3 of draft article 5 as adopted on first reading refer exactly to the legal relationships or situations determined by the violation of the this kind of rules.

133. Nowadays, the debate does not so much concern the existence of erga omnes obligations any more. Apart from the problem of identifying in concreto the treaty or customary rules establishing erga omnes obligations - a problem that need not retain us here - the main issue in the area of State responsibility is to determine the consequences of the fact that to erga omnes obligations correspond omnium rights. One must therefore determine, in view of the possibility of their violation, the precise position of the various States to the advantage of which the obligations in question exist.

(a) Is that position the same as that of States qualifying as injured States under rules other than erga omnes rules, or does it differ?

(b) Are the positions of the injured States under an erga omnes rule all the same? If they are not the same, in what sense do they differ and with what effects?

(c) It is in connection with questions such as these that one is confronted with such concepts as "directly" and "non directly" injured States, "specially" affected and "non specially" affected States, or "third" States.

134. Having rejected the last concept stated in (c), we must now deal with the other two. It should not be too difficult to show why and in what sense they are unacceptable.

B. Impropriety of the concept of non-directly injured States

135. It is perhaps convenient to take the example of a violation of erga omnes rules on the protection of human rights. As generally acknowledged, the rules of this kind create, among the States to which they are addressed, a legal relationship characterized by each State's obligation to ensure the enjoyment of human rights by any person irrespective of his nationality. Any violation of its obligation by State A will constitute a simultaneous infringement of the correlative right of States B, C, D, E etc., respectively. 277/ The rights of all the latter States being the same - namely the right to see A respect the human rights of the persons under its jurisdiction - the violation

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277/ A remarkable analysis of the matter can be found in F. Lattanzi, Garanzie, cit., pp. 79-155.

does not affect any one of them more or less directly than the other. 278/ A difference may, of course, come about if one or more of the injured States feel particularly affected in view of the fact that State A's breach consisted in a violation of the human rights of persons ethnically or otherwise related to them. This, however, does not make the latter States' injury legally more direct than that suffered by the other States.

136. Another example could be the breach of an erga omnes obligation related to the safeguard of the environment in outer space or in any area the contamination or pollution of which would affect the whole planet. An internationally wrongful act causing depletion of the ozone layer, for example, would physically affect all the existing States and would constitute a simultaneous legal injury for all the States participating in a multilateral treaty setting forth the breached obligation. Here again, there would either be an equal infringement of ... equally equal rights or at most qualitatively or quantitatively different injuries. Although differences could emerge from the point of view of the degree of exposure of States to the negative impact of the ozone depletion, this difference could in no case be correctly defined in terms of a distinction between "direct" and "less direct" or "indirect" juridical injury. Again, the concept of non-directly injured States appears to be logically untenable and reductive the injured States' title to claim cessation or reparation.

278/ Within the system of the European Convention on Human Rights the situation in question occurs in the case of those inter-State disputes in which a group of States acts against another with regard to the same violation. We refer, for example, to the Greek case (Yearbook of the European Convention on Human Rights, vol. 12, 1969) and to the case against Turkey (European Human Rights Reports, vol. 6, 1984), in which several States complained about the violation of Article 3 of the Convention (prohibition of torture and inhuman or degrading treatments).

Cases in which more than one State has reacted under general international law against human rights violations are rare and usually refer to violations amounting to the so-called international crimes of States. Examples of cases in which several States felt entitled to react without specifically referring to the "criminal" nature of the wrongful act include: the practice which followed the rise of a repressive military regime in Chile; the proclamation of the state of siege in Poland; and the measures taken by States other than the United States against Iran following the taking of the hostages. On this practice, see F. Lattanzi, Garanzie, cit., pp. 492-501.

137. A further example could be the unlawful closing by coastal State A of a canal situated within its territorial waters and linking two areas of the high seas. Such an act would affect many interests: (i) firstly, it would affect the interests of any State or States whose ships were on the point of entering the canal when the restriction was put into effect; (ii) secondly, the interests of the State or States whose ships were sailing towards the canal in order to cross it in accordance with their usual maritime route or otherwise in conformity with their planned journey; and (iii) finally, the interests of all other States because, according to the law of the sea, all States are entitled to the free use of the canal. 279/ In this case too it seems to be rather clear that there is no such thing as indirectly injured or affected States. Since all States have a right to the free use of the canal, all the States are legally injured by A's breach. The situations of the various States or groups of States do not differ in the sense that some States are indirectly injured as opposed to other States being directly injured. It would seem that States falling under (iii) are as directly injured by A's breach as States belonging to (i) and (ii). All that can be said is that the three groups of States are all injured, albeit in three different ways. Further differences may well appear in concreto among the States belonging to group (i), group (ii) or even group (iii) but only as regards the measure of the damage sustained or feared. Another example - in the area of crimes for the time being left aside - would be the various legal positions of States confronted with an act of aggression. 280/

279/ The SS Wimbledon case, decided by the PCIJ may in many respects be considered to be similar. Germany had prohibited that ship's transit through the Kiel Canal. The violation of Articles 380 to 386 of the Versailles Treaty was the object not only of complaints by the United Kingdom and France, which had - as recalled by Hutchinson - "a particular connection with that vessel - the former as the State of nationality of its charterers, the latter as the State of registry -" (D.N. Hutchinson, Solidarity and Breaches of Multilateral Treaties, cit., pp. 179-180), but also by Italy and Japan which were also parties to the Treaty but were connected with the case only by the fact that they possessed merchant ships and were therefore interested in the proper enforcement of the regime of navigation provided for under Article 380 (PCIJ, Ser. A, No. 1, pp. 6 ff., p. 20).

280/ Here again, the injured States would fall in a number of categories. Category (a) would of course consist of the State or States which are the target of the aggression; categories (b), (c), (d) and (e), could respectively include the States whose territories are bordering those of the aggressor or the victim State or States, the States of the region, the allies of the victim State(s) and the States which depend upon the victim State(s)'s vital exports; category (f) may comprise all the States participating in a collective security system together with the aggressor and the victim State. Category (g) could include all the other States bound by the rule of general

138. The conclusion seems to be that the distinction between directly and non-directly injured States does not hold water. The cases considered seem to indicate that the application of the distinction would lead:

(i) In some cases (human rights, and possibly the global environment) to the qualification of all the States whose right is infringed by a violation, as non directly injured States;

(ii) in other cases (such as the violation of the freedom of navigation, or aggression) to an improper presentation in terms of "directness" or "indirectness", of differences relating only to the nature or the degree of the injury. 281/

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international law which condemns aggression. In view of the special nature of aggression, we leave such a case to future endeavours on the problem of the consequences of international crimes. For the moment it may be useful to note that the specific nature of the wrongful act in question may prima facie induce one to refer to the victim State(s) as being "directly" injured and to all the others as being "indirectly" injured. However, the erga omnes scope of the infringed rule suggests that such a distinction would unduly restrict the circle of juridically injured States, particularly of the States participating in a relevant collective security system. A distinction in terms of "specially" or "non-specially" affected States would, in view of its ambiguity, be not any better. The only really distinctive feature - and the one which would be more consistent with solidarity among the members of a collective security system - would seem to be the nature and the gravity of the injury respectively sustained in fact.

281/ It must further be stressed that the possibility that a State qualify as an injured State on the ground of the mere violation of his subjective right (nudum ius), in the absence of any physical or other damage to any of its elements or assets, is not confined to the realm of erga omnes obligations as considered, for example, by F. Lattanzi (Garanzie, cit., pp. 120 ff.). It can also occur within the framework of a strictly bilateral context. If State A undertook by a bilateral treaty to grant aid or other forms of assistance in return for B's undertaking to respect its own nationals' civil and political rights, any violation by the latter of its obligation does constitute a legal injury to State A notwithstanding the fact that none of its elements or assets is affected. In contrast to (erga omnes) human rights obligations the obligations in the present (bilateral) case are synallagmatically related, a feature which does normally not exist in human rights undertakings. Be that as it may, to say that in the (bilateral) situation in question State A would be "indirectly" injured would be as meaningless as the same proposition would be within the context of an erga omnes human rights system. It appears to be thus even clearer that the whole concept of "indirectly" injured States is the fruit of a gross misunderstanding. This derives from an inadequate ... digestion of the definition of an internationally wrongful act as laid down in Article 3 of Part One of the draft.

139. The only reasonable starting point, for the substantive as well as the instrumental consequences of a violation of erga omnes obligations - as well as the consequences of any other kind of international (bilateral or multilateral) obligation - appears thus to be the characterization of each injured State's position according to the quality and the degree of the injury it sustained 282/

C. Conceivable and possible solutions in case of a plurality of injured States

140. The fact that the breach of erga omnes obligations results in the existence of a plurality of injured States, combined with the fact that the said States are not injured in the same way or to the same degree, surely complicates the responsibility relationship. Both the substantive and the instrumental consequences of the breach are affected. With regard to the substantive consequences the question is whether, to what extent and under what conditions the States thus equally or unequally injured are all entitled to claim cessation, restitution in kind, pecuniary compensation, satisfaction and/or guarantees of non-repetition. With regard to the instrumental consequences, the question is whether, to what extent and under what conditions the various (equally or unequally) injured States may lawfully resort to sanctions or countermeasures. Up until now these problems have been considered, within and outside United Nations bodies (under the ambiguous concepts of "non-directly" and "directly" injured or affected States), in connection with wrongful acts frequently labelled as "crimes" under Article 19 of Part One. 283/ The same problems may well arise, however, with regard to the consequences of those more common wrongful acts which are commonly referred to as "delicts".

141. As noted by some of those who have dealt with the matter so far, 284/ the problems in question may present themselves in two possible ways. The first possibility is that the relevant rules - erga omnes, or more or less general rules - envisage more or less effective and exhaustive procedures for the monitoring and sanctioning of violations. The other possibility is that such procedures are either totally inexistent or not quite exhaustive.

282/ It is for this reason that in the Sixth Committee, in 1985, we stated that "the [unitary] concept of 'injured State' ... did not imply 'a parallel [identical] treatment' of 'injured States'." (A/C.6/40/SR.27). That same year we stressed in the ILC the need to refer to the notion of "material or moral injury (préjudice) ... as a factor which must certainly affect the kind of reparation or the severity of the countermeasures to which each injured State would be entitled to have recourse". (YBILC 1985, vol. I, 1900th meeting, para. 13).

283/ See, Third Report, cit., para. 91, especially note 163, together with the reports and discussions on this matter collected in the volume entitled International Crimes of States (Weiler-Cassese-Spinedi eds.), Berlin-New York 1989.

284/ See, in so far as delicts are concerned, the authors referred to in notes 269 and 270 of the present Chapter.

142. In the measure in which the substantive and/or instrumental consequences of violations were covered by procedures involving a decisive role of an international body, their operation would in principle exclude any necessity of unilateral claims and/or measures on the part of the injured States. Although severally affected, the various injured States would in principle be in such a position that the problem of any unilateral claim, sanction or measure would not arise. It would be up to the competent international body to take due account - in putting forward claims or devising or implementing sanctions - of the plurality of equally injured States and of any differences among the unequally affected States which may have a bearing on their respective, individual positions. 285/ Any issues of unilateral claims or measures would only arise if and in the measure in which the collective or institutional system were to fail.

143. Where no organized collective system is present - which is usually the case - some authors doubt that all the injured States are severally entitled to put forward unilateral claims and to resort to countermeasures unilaterally. They fear, in particular, that the broadening of the faculté of unilateral countermeasures may lead to reactions not justified by the aim of securing the implementation of the infringed obligation 286/ or create confusion and uncertainty in the enforcement of the law and in the safeguard of the interests involved. 287/ Some of the said authors indeed contend that to entrust the pursuit of collective interests to the unilateral reaction of single States would not be in conformity with the very structure of the so-called primary relationship. 288/

285/ The - although not numerous - institutionalized or otherwise "integrated" or organized systems may vary according to the degree of "centralization" and according to whether they organize only the monitoring, the reaction, or both. In the measure in which one or the other function is effectively centralized, the legal interests of the various equally or differently injured States may be more or less adequately and effectively protected and harmonized. For the same reasons indicated supra, Chapter VII of the present Report (Doc. A/CN.4/444/Add. 2), paras. 113-116 with respect to the so-called "self-contained" regimes, any restrictions brought about by the systems in question to the rights of the participating States only affect such States inter sese at the level of treaty law. Those restrictions do not attain that level of general international law at which the Articles are intended to be placed by way of codification or progressive development of the general rules on State responsibility.

286/ See, for example, D.N. Hutchinson, Solidarity and Breaches of Multilateral Treaties, cit., p. 214; K. Sachariew, State Responsibility for Multilateral Treaty Violations, cit., pp. 282-285.

287/ J.I. Charney, Third State Remedies in International Law, cit., pp. 88-90.

288/ K. Sachariew, State Responsibility for Multilateral Treaty Violations, cit., pp. 282-285.

144. While admitting that such preoccupations may be justified and may have some merit, we believe that they are sufficient neither to prove (de lege lata) nor to justify (de lege ferenda) a derogation from the substantive or instrumental legal consequences of an internationally wrongful act. To exclude the lawfulness of individual State claims or measures would be to admit that the erga omnes violations in question would not generate liability (responsabilité); and this would be tantamount to admitting that the infringed rules are not binding. 289/ In particular, it would be incorrect to assume that, in the absence of a conventionally agreed collective monitoring and sanctioning system, no reaction would be provided for under general international law. Within the corpus of general international law there is really no "gap" to be filled with respect to individual claims or countermeasures. Each one of the States participating in an inter omnes legal relationship is indeed entitled to the same kind of rights and facultés as those to which it would be entitled within the framework of any bilateral or "bilateralizable" relationship of international responsibility. The only real peculiarities of the situations determined by the presence of a plurality of injured States - namely, by the fact that the infringed rule is an erga plurimos or omnes rule - is that the rights and the facultés of the various injured States must be determined in concreto and implemented with a view to the pursuit of the totally or partially common legal interest infringed by the breach. Let us briefly consider separately substantive rights and facultés.

145. To begin with substantive rights, one frequently meets with the proposition that in the measure in which the States involved are "only indirectly" injured (by the erga omnes breach) they would be entitled to claim cessation and guarantees of non-repetition, 290/ but not pecuniary compensation, 291/ or, according to some, restitution in kind. 292/ Although

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289/ The absurdity of such a consequence is stressed by D.N. Hutchinson, Solidarity and Breaches of Multilateral Treaties, cit., pp. 214-215; J.I. Charney, Third State Remedies in International Law, cit., p. 92 and M. Spinedi, Les conséquences juridiques, cit., pp. 121-124.

290/ All the authors who distinguish between "directly and indirectly injured" States agree on this point. See, supra, notes 269-270.

291/ The possibility that "indirectly injured" States may, at least in some cases, be entitled to demand reparation by equivalent is not ruled out by F. Lattanzi, Garanzie, cit., pp. 169 ff. and M. Spinedi, Les conséquences juridiques, cit., p. 106 ff. Within the ILC the inadmissibility of "damages" in favour of the States in question was affirmed by W. Riphagen (Preliminary Report, in YBILC 1980, vol. II (Part One), p. 114, para. 40) and I. Sinclair, YBILC 1984, vol. I, 1865th meeting, para. 3). The same position was shared by the representative of the Federal Republic of Germany in the Sixth Committee (A/CN.6/39 SR.36).

292/ "Indirectly injured" States do not have a right to restitutio according to P. Picone, Obblighi reciproci e obblighi erga omnes, cit., pp. 84-86 and K. Sachariew, State Responsibility for Multilateral Treaty Violations, cit., p. 282. The opposite view is taken by B.G. Ramcharan, State Responsibility in respect of Violation of Treaty Rules in General, and of those Creating an "Objective Regime" in Particular, cit., p. 28 and M. Spinedi, Les conséquences juridiques, cit., pp. 100-101.

it may be true that in certain instances such would be the case of a State injured by an erga omnes violation, this is not a consequence of any alleged "indirectness" of the injury. It is merely a consequence of the kind of the injury involved. If, for example, within the framework of a human rights arrangement, a State violates the rights of its own nationals by making arbitrary arrests and every other State would only be entitled to claim cessation of such a conduct and adequate guarantees of non-repetition, this would surely not be a consequence of any "indirectness" of the injury but merely of the fact that the said claims are sufficient to restore the droit subjectif of the claiming State and of the others. The object of the said droit subjectif is that none of the States bound by the rule violate the rights of the human being as such (irrespective of their nationality). If there is no right to compensation this is again not due to any "indirectness" of the injury but to the fact that the breach has not brought about a damage. This situation is not any different from that of a State injured by a breach of an obligation deriving from a bilateral treaty and not involving any damage. 293/

146. A similar reasoning - in the same situation - would apply to restitution in kind. Each one of the States involved will be entitled to claim naturalis restitutio if and in the measure in which the restoration of its right so demands. In the hypothesis considered in the preceding paragraph, there would presumably be no room for a claim of restitution in kind, the liberation of the arrested people [i.e. the cessation of the unlawful act] sufficing, together with appropriate guarantees for the future, to restore the infringed legal interest. This would, however, not necessarily be the case, if, for example, some of the detained persons had suffered any physical or moral damage. Each one of the States entitled to claim compliance with the

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293/ This is what Riphagen himself admitted when he said that the injured States in question could "not claim damages ex tunc, since by definition there is no injury to[their] material interest" (Preliminary Report, cit., para. 40, emphasis added). F. Lattanzi, instead, is of the opinion that the sum by which the State author of a violation of human rights may compensate the individual victim or victims of the violation (we should, for example, consider the practice under Article 50 of the European Convention on Human Rights, or Article 63 of the Inter-American Convention) is in compliance with the obligation of reparation by equivalent as a form of responsibility towards all the States addressees of the norm protecting the infringed right. The said States would therefore be entitled to this form of reparation as well (Garanzie, cit., pp. 169 ff., especially 234-239). See, for an example of the right of any injured State to demand pecuniary reparation for the violation of erga omnes obligations for the protection of the environment as such M. Spinedi, Les conséquences juridiques, cit., pp. 106-111. Finally, we should not forget that an erga omnes violation may in addition to causing a "legal injury" to all the States addressees of the norm also "materially affect" one or more of those States in a measure which may vary from one to the other. Such could be the case in the already recalled example of the violation of the rule on innocent passage through international sea straits. In cases such as these, each injured State will obviously have a right to reparation by equivalent to the extent that it has suffered (economically assessable) damage.

infringed rule - although, according to the current improper language, "non-directly" injured - would be entitled to claim restitution in kind. 294/ Similar considerations would apply, mutatis mutandis, in case of unlawful oil pollution of the high seas. Assuming the existence of an erga omnes breach, would the injured States or would they not be entitled severally to claim restitution in kind in terms of re-establishment of the damaged ecosystem? The answer should in our view be in the affirmative because each one of the parties in the legal relationship established by the erga omnes rule has suffered a violation of its right and is consequently entitled to claim the "restoration" (in kind) of the protected common part of the environment.

147. Moving now to the instrumental consequences, 295/ it is easy to see that any specifications of the individual faculté of resort to countermeasure on the part of the States injured by the breach of an erga omnes obligation, do not derive from any alleged indirectness of the injury. They are merely the consequences of the application, in each hypothetical or actual situation, of the general rules or principles governing countermeasures, such as the obligation of prior demand of cessation or reparation or prior exhaustion of dispute settlement procedures; and of course the requirement of proportionality.

148. The implementation of the said obligations explains, for example, the doctrine according to which "indirectly" injured States would be entitled to resort to countermeasures only in the absence of any collectively

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294/ This is what could take place in case of a violation of Article 3 of the European Convention on Human Rights. A State bringing a complaint against the violation of the said Article to the competent organ would also enjoy the right, under Article 50 of the Convention, to request that the victims of the violation obtain the required rehabilitation or, at least, the sum of money necessary to obtain medical assistance. In the measure in which one may consider the prohibition of torture to be covered by an unwritten erga omnes obligation (see, on the point A. Marchesi, La torture, cit., Chapter IV), the said claims could be forwarded also under the general norms on State responsibility.

295/ As already recalled supra, in para. 140, the problem of resort to countermeasures on the part of States which are "only indirectly affected" has been discussed almost exclusively in the context of the consequences of international crimes and in relation to the practice, beginning in the late 1970s and lasting until the mid-1980s, of some Western States to react to particularly serious crimes (proclamation of the state of siege in Poland, Soviet intervention in Afghanistan, occupation of the United States mission in Tehran, Falklands/Malvinas crisis, and the downing of Korean Jumbo KAL 007). Considering, however, that for the time being we confine our discourse to the so-called "delicts", we now refer to the erga omnes structure of the responsibility relationship and not to the degree of seriousness of the breach.

representative body's pronouncement on the measures to be adopted 296/ and in any case only as extrema ratio, in the absence of other remedies. 297/ As explained elsewhere in the present Report, the faculté of any injured State to

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296/ This position is taken by J.I. Charney, Third State Remedies in International Law, cit., pp. 91 e 97-98; J. Cardona Llorens, Deberes jurídicos, cit.; and among the members of the ILC by Lacleta Munoz according to whom an unlawful act consisting in the violation of collective interests should necessarily be met with a collective reaction (YBILC 1984, vol. I, 1867th meeting, para. 17).

This line of reasoning would find some support, according to some authors, in Article 60 paragraph 2 (a) of the Vienna Convention on the Law of Treaties, according to which only by an inter sese agreement could the States parties "not specially affected" suspend or terminate compliance with the treaty to the detriment of the State which committed the internationally wrongful act (see, for example, K. Sachariew, State Responsibility for Multilateral Treaty Violations, cit., p. 284). Reference to the said Article does not, however, appear to be of great significance. It simply spells out the conditions under which a State party to the infringed treaty may resort to suspension or termination by way of countermeasure. However, nothing is said, or was intended to be said in Article 60, about the conditions under which the States injured by a treaty breach - whether "specially affected" or "not specially affected" - could resort to countermeasures. When Riphagen, for his part, stated that "the common or collective interest created by the group of States parties to an objective regime does indeed exclude the admissibility of reprisals consisting in the non-performance of an obligation under that regime, otherwise than in consequence of a collective decision of such group of States" (Fourth Report on State Responsibility, in YBILC 1983, vol. II (Part One), para. 97) he was concerned with the identification not of the States entitled to react but of the obligations which could not be violated by way of countermeasures. Our predecessor, therefore, did not submit any possible reaction to erga omnes violations to the collective decision of the States sharing the infringed collective interest; he simply ruled out the admissibility, outside any collective conclusion, of those unilateral measures which would violate the same interest in question.

297/ J.I. Charney, Third State Remedies in International Law, cit., p. 95 e Third State Remedies for Environmental Damage, cit., p. 161.

The admissibility of resort to any measure by the States in question is summarily ruled out completely by B.G. Ramcharan, State Responsibility in respect of Violation of Treaty Rules in General, and of those Creating an "Objective Regime" in Particular, cit., pp. 40-41. In relation to the consequences of delicts, a similar position is taken within the ILC by Tomuschat, according to whom only "directly injured" States would be entitled to adopt countermeasures (YBILC 1985, vol. I, 1896th meeting, para. 38). The representative of the Federal Republic of Germany expressed a similar position in the Sixth Committee (A/C.6/40 SR.24). In support of the opinion according to which the States in question would not be entitled to resort to countermeasures, reference is sometimes made to the decision of the ICJ in the case concerning Military and Paramilitary Activities in and against Nicaragua

resort to reprisals arises not automatically from the breach but only after a prior unfruitful intimation or sommation, 298/ and only after exhaustion of dispute settlement means. 299/ In some cases the general rules creating "integral" legal relationships are embodied in instruments envisaging ad hoc procedures to be applied in view, or as a consequence of, possible violations. 300/ In such cases only if the law-breaker does not comply with

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(See, for example, D.N. Hutchinson, Solidarity and Breaches of Multilateral Treaties, cit., p. 194; J.I. Charney, Third State Remedies in International Law, cit., p. 57; A.L. Sicilianos, Les réactions décentralisées, cit., pp. 153-154). The part of the decision referred to reads: "The acts of which Nicaragua is accused ... could only have justified proportionate countermeasures on the part of the State which had been the victim of these acts, namely El Salvador, Honduras or Costa Rica. They could not justify countermeasures taken by a third State, the United States, and particularly could not justify intervention involving the use of force" (ICJ Reports 1986, para. 249). We do not believe, however, that the statement in question may be read as supporting the inadmissibility, in general terms, of measures by States "not specially affected" by an erga omnes violation. In the first place, we should not forget that the Court's principal aim was to condemn measures "involving the use of force" taken by the United States, measures which are always prohibited - with the exception of self-defence - regardless of whether the State resorting to them may be "more or less directly injured". But, most importantly, we should stress that the alleged wrongful act committed by Nicaragua consisted essentially in the violation of an obligation of non-intervention (as well as "minor" violations of the prohibition of the use of force). The Court, therefore, simply considered - and rightly so - that the obligation in question, under both general international law and the United Nations Charter, has a bilateral and not an erga omnes structure: - in other words, that there was not a right of every State to the respect of the principle of non-intervention, but only a right of each State not to be subjected to intervention in violation of its own sovereignty. As the violation of the said obligation infringes merely a bilateral relationship, it is obvious that no "third" State will enjoy secondary rights with respect to that legal relationship; - even less will it be entitled to resort to countermeasures against the author of the wrongful act.

298/ Supra, Chapter I of the present Report (Doc. A/CN.4/444), especially paras. 13-23.

299/ Ibid., Chapter II, especially paras. 41-51.

300/ Consider, for example, in the field of human rights, the system of the International Covenants of 1966 (Articles 16 to 23 of the International Covenant on Economic, Social and Cultural Rights; Articles 28 to 45 of the International Covenant on Civil and Political Rights and the Additional Protocol thereto) or the more "jurisdictional" systems of the European and Inter-American Conventions. On the systems existing in the field of protection of the environment and of areas not falling within the jurisdiction of any State, see, J.I. Charney, Third State Remedies for Environmental Damage, cit., pp. 166-174.

its liabilities as determined through the relevant procedures, would any of the injured States be entitled "individually" to resort to unilateral measures in order to protect its (individual) right to obtain respect of the common and legally protected interest. 301/ More precisely, according to the current presentation, the allegedly "special" restriction that would characterize the admissibility of unilateral measures on the part of the so-called "indirectly" injured States, appears thus to be an effect of the mere application to the situation of the conditions generally required for lawful resort to countermeasures in any concrete case.

149. A similar general principle explains another allegedly "special" restriction that would characterize the situation of the so-called "indirectly" injured States. We refer to the two conditions represented by the conformity of any "individual" measures to the pursuit of the collective interest 302/ and the fact that adequate measures have not already been taken by another injured State. 303/ Both conditions derive from the general principle which is inherent in that very function of international responsibility, namely, to ensure compliance with international obligations. As pointed out in previous reports, cessation, "restitutio", pecuniary compensation, satisfaction and guarantees of non-repetition are the object of rules aimed at ensuring the implementation of the rights created by the rules infringed by the violation. Countermeasures are in their turn instrumental to cessation or "restitutio" and the other forms of reparation; - and ultimately to compliance with the so-called primary obligation. Once that aim is achieved, the rules on responsibility cease, so to speak, to operate. They leave the field to the normal play of the so-called primary rules with regard to which their supporting function has been performed. 304/ This is precisely the mechanism that comes into operation when an erga omnes obligation has been breached and there are a number of injured States.

301/ Supra, Chapter VII of the present Report (Doc. A/CN.4/444/Add.2), especially paras. 115-116.

302/ See, for example, K. Sachariew, State Responsibility for Multilateral Treaty Violations, cit., p. 285.

303/ J.I. Charney, Third State Remedies in International Law, cit., pp. 95-96, and - at least in so far as reactions referred to as "solidarity reactions stricto sensu" are concerned - D.N. Hutchinson, Solidarity and Breaches of Multilateral Treaties, cit., pp. 163-164. Within the ILC, McCaffrey expressed the opinion that the position of "indirectly injured" States is supplementary with respect to that of the main victim of the internationally wrongful act (YBILC 1985, vol. I, 1892nd meeting, paras. 7-11). The representative of the United States in the Sixth Committee expressed similar doubts on whether an "indirectly injured" State may resort to countermeasures when a "directly injured" State exists (A/C.6/39 SR.42).

304/ Supra, Chapter I of the present Report (Doc. A/CN.4/444), especially paras. 3-4.

150. Indeed, two features characterize the instrumental consequences of a violation of an erga omnes obligation: - (i) the result to be pursued by the unilateral measures is, because of the identity of the collective interest protected by the rule, the same for all the injured parties; and - (ii) that result can be severally pursued by a plurality of such parties. The first peculiarity explains why unilateral countermeasures by any single State are justified only in so far as they conform to the common interest. As the infringed rule protects a collective interest, any reactions to the breach, however numerous and unilateral, can be lawfully resorted to only in the measure in which they perform the function of guaranteeing the (primary) legal situation represented by the common legal interest. Were any reactions not to be in conformity with such a function (because they pursue, for example, individual aims of a given reacting State or ends otherwise not protected by the infringed rule) they would fall outside of the sphere of the consequences (substantive or instrumental) of the given erga omnes breach: - and in the measure in which they were in violation of international obligations, they would in their turn be unlawful. Both features - (i) and (ii) - explain why, if adequate unilateral measures have at any given time been taken - collectively or individually - no further reaction would be lawful on the part of any of the remaining injured States. Once through the action of one or more of the injured parties redress has been obtained for all (in one or more of the relevant forms), any further measures would be without legitimate object and thus unlawful.

151. If, on the contrary, measure(s) already resorted to did not achieve the right result, the question of admissibility of any further measures cannot be resolved positively or negatively a priori. The question can only be approached in the light of proportionality. This is a general, flexible principle ensuring that the implementation of international responsibility does not lead to inequitable results. 305/ Where measures are taken by several States as a consequence of one and the same breach, respect for proportionality should prevent the aggregate effect of the unilateral measures to cause disproportion between the reaction and the breach or its effects.

152. We believe, in conclusion, that the particular problems raised by the violation of erga omnes obligations - wrongly presented in terms of a plurality of "indirectly" or "directly" injured States - call neither for amendments to the draft Articles adopted or proposed so far, nor for the addition or interpolation of further ad hoc draft Articles covering the said problems. These problems, which are more correctly to be identified in terms of plurality of equally or unequally injured States, call simply for a proper

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305/ Ibid., Add.1, Chapter IV, especially paras. 54-56.

understanding and application of the general rules so far adopted or proposed. The only useful - and probably indispensable - ad hoc provision would be the addition of a new draft Article to Article 5 as adopted on first reading for the definition of injured State. The additional draft Article would simply provide that whenever an internationally wrongful act affects more than one injured State, each one of the latter is entitled to the rights and facultés laid down in the relevant Articles, obviously in the measure in which any such rights or facultés appertain to it by reason of the infringed right and the suffered injury.

153. The Special Rapporteur adds a very tentative draft of a possible article 5 bis reading as follows:

"Article 5 bis

Whenever there is more than one injured State, each one of them is entitled to exercise its legal rights under the rules set forth in the following articles."